No. 3273.

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, HARRY L. DAY, JEROME J. DAY, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOEBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL BUCHANAN, BLANCHE DAY ELLIS, HARRY R. ALLEN, AND THE HERCULES MINING COMPANY,

Appellees.

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REPLY BRIEF OF APPELLEES, EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOEBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL BUCHANAN AND BLANCHE DAY ELLIS.

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C. W. BEALE and JOHN H. WOURMS,
Solicitors for Appellees Eugene R. Day, Eleanor Day Boyce, Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis.
Residence and Post Office Address,
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*Upon Appeal From the District Court of the United States, District of Idaho, Northern Division.*

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The untenable position taken at the oral argument of this case has been reasserted in appellant's reply brief, to-wit:

That a finding of fact of the lower court, involving conflicting testimony and the credibility of witnesses, made in

the opinion of the lower court, which was signed by Judge Dietrich, is not unassailable and conclusive upon this appeal, or as unassailable and conclusive as would be such finding if made in a special document independent of the opinion. Such a position is unsupported by any of the decisions cited in the reply brief. A complete answer to such unauthorized contention will be found in the following brief statements:

(a) A finding of fact is just as much a finding of fact when made in the opinion of the District Court as it would be a finding of fact found by such court in some other document, and a conclusion of law in the opinion of the Court is just as much a conclusion of law as though such conclusion were concluded in a paper different from the opinion.

(b) There is no Federal statute, nor rule of the Supreme Court, requiring a District Court to make a finding of fact and conclusion of law in any document separate from the court's opinion.

(c) The Supreme Court of the United States has repeatedly laid down the rule that errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by the Supreme Court, if there is any evidence upon which such findings could be made.

(d) The contention of appellant is in direct conflict with the ruling of the Supreme Court of the United States. That Court having held, in the absence of separate finding of facts, that it is the duty of the Court to accept the finding of facts in the opinion of the Lower Court.

Counsel for appellant do not claim that the court did not make findings, but what they complain of is that the findings upon the material issues were made against their client.

The case of York v. Washburn, 129 Fed. 564, which involved an action at law and not a suit in equity, instead of being a decision in support of the point upon which it is cited, holds to the contrary. The language of the court supported by numerous decisions of the Supreme Court of the United States found on page 566, being as follows:

> "That which the record discloses is nothing more than a general finding of all the issues in favor of the defendant, but, whether the finding be general or special, it has the same effect as the verdict of the jury, and, in the circumstances in which it was given, is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence."

Among other decisions cited in that case by Judge Van Devanter is the case of Dooley v. Pease, 180 U. S. 126, wherein on pages 131 and 132 will be found the following language of the Supreme Court of the United States:

> "Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made."

We will not impose upon the patience of the court by extensive citation from available decisions rendered by the Supreme Court, resting content with the statement of the rule as announced by that Court in Adamson v. Gilliland, 242 U. S. 350, page 353 of the decision:

> "That so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636."

Regardless of what the holding may be in some other circuit, following the decisions of the Supreme Court of the United States, this court stated in Butte & Superior Copper Co., v. Clark Montana Realty Co., 248 Fed. 609, on page 616, its position in the following language:

> "Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

However, this question is not open to debate since the Supreme Court of the United States has held, that, in the absence of separate finding of facts, it is the duty of that court to accept the findings of facts contained in the opinion of the lower court. Such holding was made in the case of Lawson v. United States Mining Company, 207, U. S., 1, 12. In that case the Circuit Court neglected to make or file any finding of facts or opinion, as will appear both from the decision of the Circuit Court of Appeals, 134 Fed. 769, 771, and the decision of the Supreme Court, and the Court was unable to determine whether the decision of the Circuit Court was based upon a question of fact, or a matter of law. Under such circumstances, the Circuit Court of Appeals without making or filing separate finding of facts, did make certain findings in its opinion, which findings the Supreme Court held it was its duty to accept, notwith-

standing the fact that such findings were in the opinion and not in a separate finding of facts.

The court found among other findings:

(a) That the appellant was informed of the known conditions and facts bearing upon the value of the property.

(b) That the price paid her approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source. Record page 1400.

It is respectfully submitted that under the decisions of the Supreme Court of the United States and the prior holdings of this court, such findings are unassailable, binding and conclusive on this appeal.

The monthly statements furnished by the Hercules Mining Company, and which according to the undisputed testimony of appellee, Eugene R. Day, showed what the history of the Hercules mine had been, were accessible to appellant during the life time of her husband, and such statements for the months of July, August, September, October, November and December of 1915, and January, February, March, April, May, June, July, August and September of 1916, were delivered to her by Day after her return to Idaho in April, 1916. These statements show the total amount of dividends paid and the profits earned by the Hercules Mining Company up to the date of issuance thereof from the beginning of the company's operations, and from which she and her agent, Allen, had no

difficulty in arriving at the amount of such dividends paid and profits earned.

It is difficult to concieve of a case where the managing partner could have furnished to an associate partner a more detailed, specific and particular record of the history of a mine, upon which to base the valuation of an undivided interest therein, than disclosed by the record in this suit. The testimony is overwhelming to the effect that she was advised of the past history of the mine, its known conditions, and probable future, and that she received as consideration for the sale of her interest all it was worth. She consulted her partners, Paulsen and Hutton, her agent, Allen, and her former attorney, Judge Woods, before she sold, and their testimony is to the effect that she received all her property was worth, and the evidence of Mr. Burbidge discloses that she received more than it was worth. In opposition to her own judgment and that of her agent, her former attorney, her two partners and Mr. Burbidge as to the valuation and price, there is nothing but the entirely incompetent and speculative estimate of the witness Greenough, based upon an aggregate length of ore shoots and a width thereof, which the evidence conclusively establishes did not exist.

The testimony of Mr. Burbidge as to the valuation is particularly strong when it is remembered that in arriving at the valuation of $293,405.00 for her interest, which included the cash reserve and the ore in transit, he used as a basis for such valuation the history of the mine and acted upon the assump-

tion that the three ore shoots developed on the No. 5 tunnel, if they extended below that level 1900 feet, and were as productive as they had been in the past, should produce 1,575,600 tons. However, his estimate of value based upon such assumed tonnage is too high in view of the uncontradicted testimony as to the condition of the ore shoots below No. 5 tunnel, and appellant is bound by this testimony since it was introduced over the objection of counsel for appellees.

Instead of extending into the depths of the earth with their respective lengths as they appear on the No. 5 tunnel level, these ore shoots are only about one-half as productive below the No. 5 tunnel level as at and above such level; the west ore shoot with a length of 600 feet had shortened to a length of 500 feet on the 200 foot level below the tunnel, the middle ore shoot of 225 feet will merge in the west ore shoot on the 800 foot level below, and the eastern ore shoot of a length of 150 feet has cut out entirely between the 200 and 400 foot levels below the tunnel level. Hence we have a condition proven by the testimony adduced by appellant where there is found an ore shoot 500 feet long instead of an aggregate length of 975 feet of three ore shoots, and where a section of the ore shoot on the 800 foot level of a height of 50 feet will produce 33,333 tons of ore in the place of a section of the aggregate length of the ore shoots of the same height on the No. 5 tunnel level, which produced 60,000 tons. In other words, the tonnage on the 800 foot level below No. 5 tunnel level would be about one-half of the tonnage on the No. 5 tunnel

level. Hence, Mr. Burbidge's estimate of valuation based upon the history of the mine and the possibility of the extension of the ore shoots to a depth of 1900 feet below the No. 5 tunnel level is far in excess of the real valuation.

Counsel for appellees, Eugene R. Day and Eleanor Day Boyce, at his oral argument demonstrated by means of maps, submitted for the court's consideration, based upon the evidence in the case, not only the excessive tonnage of the witness Greenough, but also his excessive valuation and that his valuation instead of being $10,000,000 should only have been $3,718,072 for the entire property.

The uncontradicted testimony is, that in arriving at his estimate of tons and valuation he included an ore shoot 325 feet long and 5 feet wide for a depth of 1650 feet, which did not have any existence, and an ore shoot 630 feet long and 15 feet wide for the same depth where such ore shoot was only 600 feet long on the No. 5 tunnel and had shortened on the 200 foot level below to 500 feet and which below the 200 foot level was 12 feet wide instead of 15 feet, and he also included an ore shoot 220 feet long and 4 feet wide for the same depth of 1650 feet that merged entirely into the 500 foot ore shoot on the 800 foot level, and furthermore, based his estimate of tonnage and valuation upon another ore shoot 200 feet long and 4 feet wide of a depth of 1650 feet where such ore shoot was only 150 feet long on the No. 5 tunnel level, and cut out entirely between the 200 and 400 foot levels below.

Greenough's total tonnage was 2,310,000 tons; his excess tonnage above the No. 5 tunnel was 12,525 tons and below the No. 5 tunnel 1,062,351, making an excess tonnage of 1,074,876 tons, leaving a net tonnage of 1,235,124 tons.

He placed an arbitrary profit of $9.39 per ton on all ore above the No. 5 tunnel, and an arbitrary profit of $4.50 per ton on all ore below the No. 5 tunnel, that is to say, he placed an excess profit of $6.39 per ton on all the ore above and an excess profit of $1.50 per ton on the ore below the No. 5 tunnel.

There is no escaping the facts as to Greenough's excessive tonnage and valuation as the proofs in the case brought out by counsel for appellant show beyond question or controversy. When it is remembered that the appellee, Day, could not get Mrs. Cardoner to visit the mine, or send anyone of her choosing to inspect and examine the same, or to visit the office of the Hercules Mining Company, or have some person in her behalf examine the records and books of said company, and when it is further remembered that in preparing for the trial, though the mine and the records of the company were thrown open to them, appellant by her counsel in open court, protested against sending anyone, and did not send anyone, to visit the office and inspect the books, or to go into the mine and examine the same, what possible excuse can there be for the reiterated contention that Mrs. Cardoner was not advised as to the known conditions, or that she had not received a reasonable price for her interest.

The case of Nelson v. Matsch Ann. Cas. 1912 D. 1242 and

note are cited both in the original and reply brief of appellant. That case is not in point as it was one which involved false representations. In the case at bar we do not have misrepresentation, false representation or concealment. In the note cited in connection with Nelson v. Matsch at page 1246 Ann. Cas. 1912 D, will be found Geddes's Appeal, 80 Pa. St. 442, wherein Justice Paxson, on page 462, referring to the failure of the selling partner to investigate the partnership books, said:

> "He was selling his own property. He had the fullest access to the books. These books were his books; they belong to the firm of which he was a member. No one ever denied him access to them, and it is not even alleged that they contained any false entries. It is not to the purpose that he did not understand them. He could have obtained the services of an expert in case he failed to obtain the information from the bookkeeper. He had the means of information, and it was his duty to have availed himself thereof. He cannot charge anyone else with the consequences, whatever they may be, of his own neglect."

The books of the Hercules Mining company were Mrs. Cardoner's books. Any information they contained was her information. She was never denied access to these books.

The relationship of Day and Mrs. Cardoner imposed no obligation upon him to furnish her with information she had from her own property.

Hence there is no foundation in the record in this case upon which to base the contention that Day should have had the

books experted for Mrs. Cardoner before he could entertain her offer for sale.

Day furnished Mrs. Cardoner with the statements *containing the history of the mine, gave her all the information he possessed concerning the same, and repeatedly urged her to go herself or have someone go in her stead to inspect the books and examine the mine, but she would not do so,* and this suit never would have been heard of if it had not been for the interference of one Joseph R. Wilson, an attorney of Philadelphia, who inspired her to initiate the same without any knowledge whatever upon his part as to the value of the property she sold, being influenced by the sordid, selfish motive of receiving from her one-twelfth of the property she had sold, providing there could be secured a decree rescinding her freely and voluntarily executed conveyance.

The position of counsel for appellees that this suit was inspired by Wilson with a selfish motive and without any justification, was made impregnable by the conduct of appellant's counsel in open court who claimed that they were seeking to remove him as executor of Mrs. Cardoner's will and to eliminate him entirely from this case.

The futile attempt, by shuffling the figures, to escape the testimony of Mr. Burbidge as to the future profit on the ore to be mined from the Hercules mine, finds no support in this record, and as pointed out in appellees' original brief, the place to have attacked Mr. Burbidge's figures and to show any inaccuracies therein was at the trial, and such an attempt was

abandoned by counsel for appellant, as will appear from the following question by Mr. Graves on cross examination and Mr. Burbidge's answer thereto:

> "Q. Is the rest of your estimate, Mr. Burbidge—I am asking this without meaning to be offensive, as I am sure you know—is the rest of the figuring and estimating you have done there done as accurately as that part of it, do you think?
>
> "THE COURT: You need not answer that.
>
> "A. You have not shown any inaccuracy there yet, have you?" (Record Page 909.)

The sane and businesslike method by which Mr. Burbidge arrived at his conclusion of future profit commends itself both to the court and a prospective purchaser of a mining interest. He testified as follows:

> "In the five years 1908-1912 inclusive, the profit per ton of ore mined averaged $3.37."
>
> "MR. GRAVES: What was that last period you gave?"
>
> "A. 1908 to 1912. This was a period of normal prices for both lead and silver, and labor and other operating conditions were also normal."
>
> "It was difficult to estimate the probable profit to be realized on the ore yet to be mined, for many variable factors entered into the calculation. The period 1907-1916 included two boom periods, when the price of lead was higher than normal. On the other hand the cost of production was greater. In 1910, the first year in which operations were on present scale, the cost was $2.71 per ton of ore mined, and in 1916 it had grown to $5.25, an increase of over 90 per cent. The operation of the mine was just about to begin through the shaft; which would add 25 cents per ton to the cost."
>
> "This country had not then entered the war. But it was even then a matter of general belief that after the

war ends there will be a long period of business depression, which will necessarily mean low prices for lead and silver."

"Taking all these things into consideration, as well as the decreasing silver content and the increase of zinc, it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton." (Record pages 903 and 904).

Under a period of normal prices for lead and silver and of normal labor and operating conditions, the profit on the ore mined from the Hercules mine averaged $3.37 per ton. Such ore was produced by operating the mine through tunnels. Operation of the Hercules mine subsequent to the time of sale was to be through the shaft, which would add 25 cents per ton to the cost of production. Deducting this from $3.37 the past profit per ton and we have $3.12, or a difference of twelve cents per ton between the past normal profit and Mr. Burbidge's estimate of $3.00 per ton, which would be more than consumed by the decreasing silver content and the increase of zinc in the place of lead in the ore contained in the Hercules vein below the No. 5 tunnel level, and the depressed business conditions necessarily accompanied by lower metal prices after the war, so accurately forecast by Mr. Burbidge.

The uncontradicted testimony of Mr. Burbidge proves that the increased production of ore and abnormal profits for the years 1914, 1915 and 1916, with which Mrs. Cardoner was familiar, cannot be taken as a measure, or guide, for fixing valuation, or estimating the future tonnage and profits, and that subsequent to 1916 the price for metal had so decreased

and the expenses of production so increased, as to leave the mine owners of the Coeur d'Alene district in a position not so advantageous as when operating under normal conditions.

His testimony needs no explanation and stands uncontradictable, let it speak for itself:

"Q. You spoke about the profits in 1915, and 1916, and 1914, and said something about abnormal conditions. Will you please explain to the court what you meant by that?"

"A Of course, I referred to the abnormal prices they—that have ruled for lead in the last two or three years. The normal price of lead over a long period, over a period of thirty years, is $4.32 1-2.

"Q. Yes. Go on.

"A. In 1916 the price was $6.83, or $2.50 a hundred more than normal. That is the reason that the profits in 1916 were so large. Also, under the stimulus of that high price, the mine had exerted every effort to increase its output, and had produced a larger tonnage than in the previous years.

"Q. What have you to say as to the present condition with reference to the profits as they obtain now, the expense of operation, and the price of lead?

"THE COURT. I thought he had explained that.

"MR. BEALE: No, at the present time, I mean.

"A. I did say that in 1916 the cost of production increased ninety per cent over that in 1910.

"Q. How is it today?

"A. There has been a still further increase.

"Q. How about the price of lead?

"A. The price of lead is now $6.25 per 100 as compared with $6.83 last year. With the increased cost of production, none of the mines of the Coeur d'Alene district today are any better off, if as well off, as they would be under normal conditions, with lead at $4.25."

Added to the above situation of a falling market and an

increased expense of production, was the inevitable income and excess profit tax, all of which conclusively establish that the purchaser of the Cardoner interest could not expect to recover from the ore in the Hercules mine a normal profit per ton in the future equal to the normal profit per ton realized in the past.

In addition to the evidence of her disinterested partners, her agent, and her former attorney that Mrs. Cardoner received all that her interest was worth, and the full market price for the same, the court is requested to make a careful investigation of the testimony of the appellee Harry L. Day, enumerating the considerations that influenced him to take a quarter interest in the property purchased by his brother from Mrs. Cardoner, since in the absence of such considerations he would not have been willing to do so, on account of the high price paid. (Record pages 975 to 980 inclusive.)

Mr. Harry L. Day also showed by his testimony, on cross examination, based upon a personal acquaintance, that the veins in the neighborhood of the Hercules mine were shorter and narrower as they descended into the earth, and also poorer in metal content. (Record pages 987 to 991 inclusive.)

His testimony in this particular is both intelligent and convincing, and directly in conflict with that of the witness Greenough, who was shown on cross examination not to have had any personal knowledge upon which to base a conclusion of such veins being longer and wider with depth. However, Mr. Day's testimony affirmed Mr. Greenough's report of the

date of June 3rd, 1916, made to the stockholders of the Marsh Mining company as to his work on the Marsh mine, which showed that the 900 foot level therein had been opened up and proven very disappointing and that the ore body on such level was considerably shorter and lower in grade than on the levels above. And Mr. Day's testimony also showed that the operations of the Marsh Mining company had been attended with great loss, in which operations that company had spent from three-quarters of a million to a million dollars and only got back $400,000.00.

The keystone of this litigation was the false averment that appellee Allen, as the agent and representative of Eugene R. Day and Eleanor Day Boyce and in conspiracy with them, induced appellant to sell her interest to Eugene R. Day. That stone crumbled at the trial, and the pretended cause of action of Mrs. Cardoner tumbled down upon the heads of counsel for appellant when in open court they consented to the elimination of Allen from this case, thereby acknowledging to the court that the suit had its inception in a false allegation.

Damian Cardoner, the husband of Mrs. Cardoner, before and at all times subsequent to the year 1901, when the Hercules mine was first operated as a dividend property, and up to the time of his death in February 1915, was the owner of the interest sold to Day by his widow.

Mrs. Cardoner lived for years at Burke within the very shadow of the mountain that walled the famous Hercules vein

and it is unthinkable and unbelievable that she should be ignorant of its wonderful history and its marvelous productivity.

Referring to her story of such want of information, Judge Dietrich was constrained to say and to find in his opinion that credence could not be given to the incredible.

The credibility of the witnesses was for the determination of the lower court, and it is respectfully urged that the court's findings involving such credibility and based upon uncontradicted evidence and testimony that overwhelmingly preponderated in favor of the appellees, are not only conclusive, but unassailable on this appeal.

Respectfully submitted,

C. W. BEALE and JOHN H. WOURMS,
Solicitors for Appellees Eugene R. Day, Eleanor Day Boyce, Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis.

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